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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-909

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ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Petitioners*

v.

PATSY T. MINK, ET AL., *Respondents*

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE RESPONDENTS

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### STATUTE AND EXECUTIVE ORDERS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552, is reprinted as Appendix A in the petitioners' brief. Executive Order 10501, as amended, 3 C.F.R. at 306, is reprinted in part as Appendix B in the petitioners' brief. Executive Order 11652, 37 Fed. Reg. 5209, is reprinted as Appendix A in this brief.

## QUESTIONS PRESENTED

1. Whether the Freedom of Information Act, 5 U.S.C. § 552, permits the government to withhold materials solely on the basis of its *ex parte* assertion that those materials have been generally classified "secret" pursuant to a 1953 executive order no longer in effect.

2. Whether the Act permits the government to withhold materials solely on its *ex parte* assertion that they are "advisory," even though they contain unclassified factual matter.

3. Whether the Act, which imposes on the government the burden of persuading the court in a *de novo* judicial proceeding that it is entitled to withhold requested materials, permits the government to meet that burden by resting solely upon *ex parte* assertions that the disputed materials are exempt under the Act, with no opportunity either for adversary testing of those assertions or an *in camera* inspection of the materials.

4. Whether the government may rely on the statutory exemptions in the Act to withhold information from Members of Congress who sue under the Act in their official capacities.

## STATEMENT

The respondents are 33 duly elected and installed Members of the United States Congress.[1] They commenced this suit in the United States District Court for the District of Columbia under the Freedom of Information Act, 5 U.S.C. § 552, to compel the petitioners to disclose certain documents pertaining to an underground nuclear test, code-named "Cannikin,"

[1] The respondents are the named plaintiffs in the complaint (App. 3-7).

conducted at Amchitka Island, Alaska on November 6, 1971.[2] The respondents sought the materials to assist them in carrying out their legislative responsibilities in passing upon the Congressional appropriation for the Cannikin test (App. 9-10, 19-23). They sued both as Members of Congress and as members of the public.

Before the district court, the petitioners admitted the existence of the documents sought. Those documents—numbering nine in all[3]—are reports, memoranda, or letters prepared in connection with a study of the Cannikin test by a committee under the chairmanship of the Undersecretary of State, John N. Irwin, II (App. 28-29). Under the Act, the petitioners had the burden of proving their right to withhold the documents.[4] However, the petitioners resisted disclosure, claiming exemptions under the Act itself—(1) that the documents are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," § 552(b)(1), and (2) that they are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency [from which disclosure is sought]," § 552(b)(5).

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[2] On that day, this Court declined to enjoin the Cannikin test. *Committee for Nuclear Responsibility* v. *Schlesinger*, 404 U.S. 917. That litigation, featuring the release of several of the documents involved here, continues to bear upon this case. See *infra* at 26, 28, 31-32.

[3] A tenth document—the "impact statement" of the Atomic Energy Commission—has been publicly available at all pertinent times pursuant to the National Environmental Protection Act, 42 U.S.C. § 4321 *et seq.*

[4] The Act provides pertinently: "The court shall determine the matter de novo and the burden is on the agency to sustain its action." §552(a)(3).

The petitioners moved for summary judgment, relying solely upon an affidavit submitted by the petitioner Irwin. That affidavit asserted that all except one of the nine documents "involve . . . highly sensitive matter that is vital to our national defense and foreign policy," and that all of the disputed documents "were prepared solely for the purpose of giving advice to the President" (App. 29).

The Irwin affidavit did not purport to claim that each of the documents in question had been *specifically* kept secret by Executive order, as required by the statute. Nor did it purport to claim that any of the documents had been examined with a view to declassifying such portions as might not be required to be kept secret. To the contrary, the affidavit suggested that the documents had all been given one over-all classification under Executive Order 10501—an order, promulgated in 1953, that established a general secrecy classification scheme for all executive agencies.

Moreover, the Irwin affidavit suggested that at least some of the documents in question had been classified secret—not because of their own contents, but only because they were physically attached to *other* documents that had been so classified. That suggestion was confirmed by the subsequent admission of the petitioner Ruckelshaus, whose memorandum is one of the documents at issue here, that "nothing in [his] comment . . . needs to be stamped 'top secret,' " (App. 56), and by the Environmental Protection Agency's later declassification of that memorandum (Pet. Br. 6, n.5).

Nor did the Irwin affidavit purport to claim that each—or any—of the documents in dispute consisted solely of recommendations for the President, rather

than recommendations together with factual information.

The petitioners offered in evidence nothing besides the Irwin affidavit. Despite the deficiencies in their proof, the district court granted their motion for summary judgment on each of the two statutory grounds they had advanced (Pet. App. C.). The court did so without undertaking an adversary testing of the *ex parte* statements in the Irwin affidavit, and without examining any of the documents by itself.

Insofar as the respondents sought to maintain the action in their official capacities as Members of Congress, the district court dismissed the complaint on "separation of powers" grounds, and dismissed as moot the respondents' motion for summary judgment based on the statutory claim that the exemptions in the Act do not apply to them.[5]

The respondents took an expedited appeal (App. 53-55). The Court of Appeals for the District of Columbia Circuit reversed and remanded the matter to the district court for further consideration (Pet. App. A, B). The court of appeals did not pass upon all the questions argued to it (Pet. 29). Rather, that court "conclude[d] that summary disposition [of certain issues] is inappropriate," and that several issues argued by the parties "should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand" Pet. 24). Thus, it did not reach the question whether the Freedom of Information Act confers any greater

[5] Section 552(c) provides pertinently: "This section [552, including the exemptions in subsection (b)], is not authority to withhold information from Congress."

rights to disclosure on Congressmen than it does on members of the public generally.[6] The court did not pass on the respondents' contention that the first exemption requires that each document sought to be withheld must be classified by a separate Executive order (Pet. 24).

The court of appeals did decide two narrow issues. The first related to the petitioners' claim under the first exemption. Here the court noted the inadequacies of the Irwin affidavit. It thought that a matter as important as one involving the first exemption should not be determined on the basis of the Irwin affidavit as it stood. It directed the district court to "take evidence on whether, and to what extent, the file [of withheld documents] contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret." On the same reasoning, it directed the trial court to determine whether "non-secret components [of documents] are separable from the secret remainder and may be read separately without distortion of meaning" (Pet. 27).

The second holding of the court of appeals directed similar treatment with respect to the petitioners' claim under the fifth exemption. Here the court noted that "the exemption protects the decisional processes of the President, or other policy-making executive officials" (Pet. 28). The court ruled that it would extend that protection to factual information wherever "it is inextricably intertwined with policy-making processes" (*ibid*). (footnote omitted).

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[6] Contrary to the petitioners' suggestion (Pet. Br. 7, n. 6), those issues *are* germane here, since their resolution in the respondents' favor by the Court would preclude a reversal of the judgment below. See *infra* at 53-59.

The court of appeals demonstrated its awareness of the sensitivity of the materials at issue. "In approaching this problem," it said, "we have in mind the very special place the President occupies in the conduct of foreign affairs, both traditionally and constitutionally, apart from his additional responsibilities in connection with the national defense." Commenting on the first exemption, the court noted:

> "In the exemption from disclosure contained in Section 522(b)(1) Congress has recognized the need for protection of the channels of communication and advice to the President in both these respects which are involved in the present litigation .... Moreover, although we have held in *Soucie* v. *David* [448 F.2d 1067] ... that the policy of the Act requires that the exemptions from disclosure prescribed by [the statute] ... be construed narrowly, this admonition must be tempered somewhat when the documents contain data supplied to the President with respect to nuclear explosions involving not only the national defense but the conduct of foreign affairs by the President in the context of such nuclear testing" (Pet. 28-29).

With respect to the fifth exemption, the Court observed that the district court

> will likewise have in mind, in possibly separating out factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption, the sometimes delicate character of the responsibility of the President in the conduct of foreign affairs" (Pet. 29).

To avoid unwarranted disclosure of the disputed materials, the court of appeals ordered an *in camera* inspection of the documents by the trial court, "else

the possibility of *non-disclosure* under the guides . . . would be defeated" (Pet. 28) (emphasis supplied). Thus — contrary to the petitioners' suggestion — *in camera* inspection was ordered to protect the government from excessive disclosure. The court viewed the *in camera* process as a judicial restriction upon the traditional adversary process and upon public access to documents held by the government—a restriction adopted to implement the disclosure requirements of the Act without revealing any materials that the government might be entitled to withhold.

The petitioners applied for a writ of certiorari, and the Court granted review on March 6, 1972. 405 U.S. 974. Two days later, the President issued an Executive order that drained the case of importance and possibly rendered it unworthy of review. Executive Order 11652 established a new regime for the classification of national secrets. Indeed, it revoked Executive Order 10501, upon which the petitioners based their claim for review, and effectively adopted the rationale of the court below.[7]

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[7] In their brief in opposition to the petition for the writ, the respondents urged that the case did not raise the questions sought to be presented: that most of the documents in dispute had already been reviewed *in camera* by the trial court, the court of appeals, and this Court; that the case was not ripe for review; and that a remand to the trial court would be necessary in any event (Br. in Opp. 7-11). In addition to those points—which the respondents submit would justify dismissal of the writ as improvidently granted—the Government has now promulgated a new secrecy classification scheme that effectively moots the petitioners' case. See *infra* at 28, 32.

## SUMMARY OF ARGUMENT

The Freedom of Information Act compels the disclosure of government information, subject only to narrowly defined statutory exemptions. The Act specifies—and the lower courts uniformly hold—that a government agency seeking to withhold documents requested under the Act must shoulder the burden of persuading a court in a *de novo* judicial proceeding that its refusal to disclose is justified. The petitioners have failed to meet that burden here. Their reliance on two of the statutory exemptions is misplaced.

1. The first exemption, relating to matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy," does not permit the government to rest, without more, on a "secrecy" classification under Executive Order 10501.

Executive Order 10501 has no bearing on the first exemption. Neither the Act itself, nor its legislative history, shows that Congress intended that general Order to exempt documents from disclosure. To the contrary, it is generally assumed by leading commentators that the Act requires a specific order from the White House in respect to each requested document. K. C. Davis, *Administrative Law Treatise*, § 3A.16, at 143 (1970 Supp.). Even the petitioners concede that mere classification under Executive Order 10501 does not satisfy the Act, for they have abandoned the contention that "derivative classification" under the Order exempts documents from disclosure. Yet derivative classification—the practice of classifying all documents in accord with the documents they are physically attached to—is as much as part of Executive Order 10501 as the portions the petitioners would rely upon.

If that portion of the Order is irreconcilable with the Act, then the Order can hardly be the one Congress intended to incorporate.

Even if Executive Order 10501 were once part of the Act, it no longer is. The President has now issued Executive Order 11652, effective June 1, 1972, which explicitly revokes Executive Order 10501. The new order will not only govern future requests under the Act, but will determine the procedures to be followed on the remand ordered by the court below. Moreover, the new Order requires the government to perform the very portion-by-portion analysis that the court of appeals directed to take place *in camera*. To that extent, it not only codifies the procedure ordered by the court below but directly repudiates the petitioners' assertion that portion-by-portion classification "would create serious problems for the executive branch" (Pet. 10).

Finally, the portion-by-portion analysis ordered by the court below has already been followed in respect to some of the very documents involved in this case. The same district judge who was ordered to examine the nine disputed documents here has already examined six of them in a related litigation and released their nonsecret portions. He had no more difficulty separating the secret and nonsecret portions of those documents than the petitioners in separating secret documents from the nonsecret documents to which they were physically attached.

2. The fifth exemption, similarly, affords no basis for withholding the documents. The exemption protects "interagency or intra-agency memorandums" that would be available under the federal law of dis-

covery ("available by law to a party . . . in litigation with the agency"). Congress incorporated the exemption to protect the policy-making process within the executive branch. Rather than propose a hard and fast standard itself, Congress delegated to the federal courts the responsibility for adducing a workable standard on a case-by-case basis.

The federal courts have construed the exemption in light of their common law experience with agency memoranda. Accordingly, while exempting executive opinions and recommendations that reflect the policy-making process, they routinely disclose factual matter that has no adverse impact on the expression of policy. The court adapted that standard to the present case by ordering the disclosure of all facts not "inextricably bound" up with opinions and recommendations.

The petitioners have overstated the problem of separating facts from opinions. If the petitioners can show that the factual matter in these documents is "inextricably bound" up with expressions of policy, then it is already exempt under the order of the court below. But prior experience shows just the contrary. The same trial judge ordered to examine these documents already reviewed at least three of them in a related case, separated fact from opinion, and disclosed their factual portions to the public.

3. The court of appeals properly directed an *in camera* inspection of the disputed documents. Even if the petitioners were correct about the first and fifth exemptions, the government cannot rely on *ex parte* assertion to show that it has complied with them. The Act requires a *de novo* hearing with the burden on the government to justify nondisclosure. The government cannot satisfy that statutory burden by means of con-

clusory affidavits. It must, at the very least, submit its proof to the consideration of a neutral magistrate.

The respondents contended in the court below that the government should submit its proof to the normal adversary procedures. See *Alderman* v. *United States,* 394 U.S. 165 (1969). However, the court ordered an *in camera* inspection precisely for the purpose of protecting the government's interests in secrecy. Now the government would deprive the federal courts of any role at all in the administration of the Freedom of Information Act. Petitioners would foreclose *de novo* judicial review by the *ex parte* assertion that documents are immune from disclosure. They suggest that the courts cannot be entrusted to consider questions of national security. The Court rejected that argument last Term, *United States* v. *United States District Court,* — U.S. —, 41 U.S.L.W. 4761 (1972), and should do so again.

4. Whether or not the respondents are entitled to the relief below as members of the public, they have a special statutory right under the Act as Members of Congress. After setting forth the exemptions—including the two at issue here—that limit disclosure "to the public," Section 552(c) provides that "[t]his section is not authority to withhold information from Congress." Accordingly, Members of Congress who proceed in their official capacity have a right of disclosure free from the limits of the first and fifth exemptions.

The special statutory right of Members of Congress reflects their special needs for information. They cannot adequately perform their legislative tasks without commanding information within the executive branch. To complement their informal sources, they have pro-

vided a statutory remedy to obtain such information in a systematic fashion.

The district court wrongfully dismissed the suit below insofar as the respondents were suing as Members of Congress. It erred in holding that their suit raised nonjusticiable questions that the federal courts are incapable of resolving. The respondents do not assert a right that cannot be "judicially determined," or seek a remedy that cannot be "judicially molded." *Baker* v. *Carr,* 369 U.S. 186, 198. Nor do they ask the courts to decide an issue that the Constitution has committed to another branch of government. See *Gravel* v. *United States,* — U.S. — (Nos. 71-1017, 1026) (June 29, 1972); *Powell* v. *McCormack,* 395 U.S. 486 (1969). Instead, they seek relief under an Act of Congress insofar as it vests them with a special cause of action. In asking the federal courts to fashion standards, to apply them, and to provide relief, their suit in no way differs from private Freedom of Information Act suits.

## ARGUMENT

### Introduction

The Freedom of Information Act favors the disclosure of government information, and requires its production in all but a narrowly defined series of exemptions. Prior to the adoption of the Act in 1966, § 3 of the Administrative Procedure Act allowed the government to withhold information "in the public interest" or "for good cause found," and to require the person requesting information to show that he was "properly and directly concerned." 60 Stat. 238, 5 U.S.C. § 1002 (1964). Under the old law, agency and department heads enjoyed a "sort of personal ownership of news about their units . . . . H. Rep. No. 1497,

89th Cong. 2d Sess. at 2 (1966). Congressional hearings revealed widespread and extensive criticism of the law by members of the press and other concerned individuals. See Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1666 and S. 1663, 88th Cong., 1st Sess. (1963).

As a result of that criticism, Congress passed the Freedom of Information Act, in the words of Chief Judge Friendly, to "increase significantly the public availability of agency records." *LaMorte* v. *Mansfield*, 438 F.2d 448, 451 (2d Cir. 1971). As the Court of Appeals for the Second Circuit has recently written:

> "The broad legislative intent behind the enactment of the Freedom of Information Act, as disclosed by the Report of the Senate Committee on the Judiciary and the Report of the House Committee on Government Operations, was to give the electorate greater access to information concerning the operations of the federal government. The ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Frankel* v. *SEC*, — F.2d — slip. op. 2947, 2953-54 (2d Cir. May 4, 1972) (No. 71-2213) (footnotes omitted).

The petitioners concede that the Act "generally makes government records available for public inspection" (Pet. 9), and that the Act "was designed to make available to the public considerably more information than had previously been accessable" (Pet. Br. 14). As Mr. Justice Rehnquist—then Assistant Attorney General in the Office of Legal Counsel of the Justice

Department—recently testified before Congress, "The act is an epochal step in democratic government."[8]

The Act establishes a general rule of disclosure, enforced by a special judicial procedure. The statute provides pertinently that "each agency [of the Government], on request for identifiable records . . . *shall* make the records promptly available to any person." § 552(a)(3) (emphasis supplied). The Act specifies the means of judicial enforcement of its mandate:

> "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. *In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action*" (*id.*) (emphasis supplied).[9]

The Act thus rejects the usual principle of deference to administrative determinations — first, by requiring a trial *de novo* in the district court; second, by shifting the burden of proof to the governmental de-

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[8] Hearings before a Subcommittee of the House Committee on Government Operations on U. S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act (Part 4), at 1184 (March 10, 1972). (Hereafter cited as "Hearings").

[9] The importance attached by Congress to the judicial remedy is evidenced by its assignment of priority status to suits under the Act:

> "Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way." § 552(a)(3).

fendant. As the District Court for the Southern District of New York put it:

> "The purpose of the Act, seen in the statutory language and the legislative history, was to reverse the self-protective attitude of the agencies. . . . The Act made disclosure the general rule and permitted only information specifically exempted to be withheld; it required the agency to carry the burden of sustaining its decision to withhold information in a de novo equity proceeding in a disrtict court. Disclosure is thus the guiding star . . . in construing the Act." *Consumers Union* v. *Veterans Administration,* 301 F.Supp. 796, 799-800 (S.D.N.Y. 1969) (footnotes omitted), *appeal dismissed as moot,* 436 F.2d 1363 (2d Cir. 1971).[10]

The procedure of *de novo* judicial review applies as well to any agency claim that documents sought to be discovered come within one or more of the nine statutory exemptions to disclosure. Here, too, the agency has the burden of proof "as to whether the conditions of exemption in truth exist." *Epstein* v. *Resor,* 421 F.2d 930, 933 (9th Cir.), *cert. denied,* 398 U.S. 965 (1970).

The *de novo* judicial review is to be conducted in light of the statutory command of § 552(c) that the Act "does not authorize withholding of information

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[10] *Accord: Epstein* v. *Resor,* 296 F.Supp. 214, 216 (N.D. Cal. 1969), *aff'd,* 421 F.2d 930 (9th Cir.), *cert. denied,* 398 U.S. 965 (1970); *City of Concord* v. *Ambrose,* 333 F.Supp. 958 (N.D. Calif. 1971); *Nichols* v. *United States,* 329 F.Supp. 130, 133 (D. Kan. 1971); *Benson* v. *General Services Administration,* 289 F.Supp. 590, 591 (W.D. Wash. 1968), *aff'd,* 415 F.2d 878 (9th Cir. 1969); *Cooney* v. *Sun Shipbuilding & Drydock Co.,* 288 F.Supp. 708, 710 (E.D. Pa. 1968). *See also Sterling Drug Co.* v. *FTC,* 450 F.2d 698, 703 (D.C. Cir. 1971); *Soucie* v. *David,* 448 F.2d 1067, 1077 (D.C. Cir. 1971); *American Mail Line, Ltd.* v. *Gulick,* 411 F.2d 696, 702 (D.C. Cir. 1969).

or limit the availability of records to the public, except as *specifically* stated" in the statutory exemptions (emphasis supplied). The accompanying Senate report places a heavy burden on the government to justify nondisclosure:

> "The purpose of [§ 552(c)] is to make it clear beyond a doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in [§ 552 (b)] . . .
>
> "It is the purpose of the [Act] . . . to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated statutory language* and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld" S. Rep. No. 813, 89th Cong. 1st Sess. 3, 10 (1965) (emphasis supplied).[11]

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[11] "The Act [makes] . . . disclosure the general rule and [permits] . . . only information *specifically* exempted to be withheld." *Consumers Union*, 301 F.Supp., at 799-800 (footnote omitted) (emphasis supplied). "The policy of the Act requires that the . . . exemptions [be construed] narrowly." *Soucie* v. *David*, *supra* n. 10, at 1080; *cf. Getman* v. *NLRB*, 450 F.2d 670, 673-74 (D.C. Cir. 1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford* v. *Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *cf. Bristol-Myers Co.* v. *FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970).

A leading commentator on federal administrative practice and the Freedom of Information Act agrees that the general mandate of § 522(c) is to be accorded weight throughout the statute. Professor Kenneth Culp Davis has written that the "pull of the word 'specifically' [in subsection (c)] is toward emphasis on [the] statutory language" of the nine stated exemptions. The "specifically stated" clause in § 552(c), he notes, "is often relevant in determining the proper interpretation of particular exemptions. K. C. Davis, Administrative Law Treatise, § 3A.15, at 142 (1970 Supp.).

## I. THE FIRST EXEMPTION DOES NOT IMMUNIZE ENTIRE DOCUMENTS SIMPLY BECAUSE THEY HAVE BEEN LABELED "SECRET."

The first exemption under the Act immunizes from disclosure matters "*specifically required by Executive order* to be kept secret in the interest of the national defense or foreign policy." § 552(b)(1) (emphasis supplied). That language was selected "to delimit . . . the exception and to give it a more precise definition." S. Rep. No. 813, *supra*, at 8.

The petitioners urge that the documents in dispute fall within the first exemption solely because they were once labeled "secret" under a general classification scheme promulgated nearly two decades ago. That scheme was established by Executive Order 10501, issued in November 1953. Under that order, certain Government materials could be labeled "confidential," "secret," or "top secret."

The petitioners' reliance on Executive Order 10501 is untenable for two reasons. First, that Order has nothing to do with the first exemption. Second, if the Executive Order did control the meaning of the exemption, it does so no longer: it has been replaced by a new Executive Order that effectively codifies the decision below.

### A. Executive Order 10501 Has No Bearing on the First Exemption.

#### 1. Neither the statute nor its legislative history shows that the exemption incorporates 10501.

The Freedom of Information Act makes no reference to Executive Order 10501. Neither does the Senate Report accompanying the bill that ultimately become law. The only pertinent document that so much as mentions Executive Order 10501 in connection with

the first exemption is the accompanying House Report. But that report did not adopt the suggestion imputed to it by the petitioners — that classification under Executive Order 10501 would, without more, entitle an agency to withhold records under the new law. Rather, the committee said:

> "[C]itizens both in and out of Government can agree to restrictions on categories of information which *the President has determined must be kept secret to* protect the national defense or to advance foreign policy, *such as* matters classified pursuant to Executive Order 10501." H. Rep. No. 1497, *supra,* at 9-10 (footnote omitted) (emphasis supplied).

The House Report refers to Executive Order 10501 merely to suggest the sorts of material that *the President,* under the new law, may properly determine to keep secret. The petitioners do not contend that the President has ever determined that any of the information sought by the respondents, or even the category of that information taken as a whole, "must be kept secret. . . ." Rather, the petitioners rely upon the fact that some officer of government — not known to the respondents and perhaps not even to the President — has made that determination.[12]

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[12] Despite their reliance upon extracts from the legislative debates and hearings preceding enactment of the bill, the petitioners nowhere point to any statement, whether by an advocate or an opponent of the Act, to the effect that Executive Order 10501, without more, satisfies the first exemption. Rather, Congressman Gallagher confirmed that "the bill in no way affects categories of information which *the President*—as stated in the committee report—has determined must be classified" (see Pet. Br. 19) (emphasis supplied). Congressman Moss's observation that the first exemption "recognizes" Executive Order 10501, and was drafted "in conformity" with it (*id.*), was made before a committee, not

**2. Contemporaneous and scholarly interpretations of the Act show that the exemption does not embrace 10501.**

Upon the adoption of the Act, the Department of Justice prepared a memorandum to establish a uniform agency policy on administrative interpretation and procedure under that new statute. That Memorandum "is the law in the sense that it guides the government's practices under the Act." K. C. Davis, *Administrative Law Treatise*, § 3A.1, at 115 (1970 Supp.). It provides further evidence that the petitioners cannot rely solely on Executive Order 10501. The Memorandum states:

> "[N]o great degree of specificity is contemplated in identifying matters subject to this [first] exemption. *However, in the interest of providing for the public as much information as possible, an Executive Order prepared for the signature of the President in this area should define as precisely as is feasible the categories of matters to be exempted.*" Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 30 (1967) (emphasis supplied).

By their own admission, the petitioners have failed to follow the route described in the memorandum. No Executive Order exists "in this area"; no Executive Order defines at all, let alone "as precisely as is feasible," the material sought by the respondents.

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in debate, and a year before final passage of the bill. And it means no more than what it says—that the first exemption was written with awareness of the general classification scheme, and that the two do not conflict. Both quotations are a far cry from the point, sought to be established by the petitioners, that a classification under Executive Order 10501, without more, immunizes an entire document from disclosure by virtue of the exemption.

The leading commentator on the Act has considered the interpretation to be accorded the first exemption without once suggesting that its scope is defined by Executive Order 10501. The view of Professor Davis is that where an agency seeks to resist disclosure under the exemption, the agency head must request—and obtain—a specific Executive Order directed to that request. "Under the Act." Professor Davis has written, "the Secretary would presumably ask the White House for an executive order, and a presidential assistant would presumably comply." Davis, *Administrative Law Treatise, supra,* § 3A.16, at 143.

Requiring a specific Executive Order for the withholding of material under the first exemption is neither burdensome nor unprecedented. During the first four years of the Act, government agencies have recorded only 30 denials of requests for information on the basis of the first exemption.[13] Moreover, precisely that requirement — voluntarily adopted by the President himself — is routinely followed when the government invokes "executive privilege" in withholding information from Congress.[14]

The requirement that requested documents be specifically classified by separate Executive Order before invocation of the first exemption also accords with the realities of classification. There are millions of documents within the executive branch now classified under Executive Order 10501. It is estimated, for example, that the Defense Department alone has over 20 million

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[13] See Hearings *supra,* n. 8, at 1342-43.

[14] The text of the President's Memorandum setting forth this policy is reproduced as Appendix B to this brief.

such documents or over a million cubic feet of secret papers—enough to equal 18 stacks of documents each as high as the Washington Monument. Hearings at 658, 685 (1971). There are some 150 million pages of paper still classified from World War II, and another 75 million from the Korean War. Hearings at 1012.

Some of those documents, and portions of them, would surely be declassified if the government had the resources to review them.[15] But the sheer volume of classified information overwhelms any such effort.[16] Indeed, Executive Order 10501 has not even provided for effective declassification.[17] The Freedom of Infor-

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[15] In a special project to review 240,000 selected World War II documents, for example, the Department of Defense determined in 1965 that over 100,000 should be declassified and that another 119,000 should be destroyed as non-record material. Hearings at 690.

[16] See Statement of David Cooke, Principal Deputy Assistant of Defense, in Hearings at 390,659.

The State Department estimated that it would take 24 clerks about a total of 10 years to declassify only a portion of its files:

> "For just one portion of our central foreign policy files, a portion containing about 5 million documents, we have estimated that a page-by-page review for declassification purposes would require the hiring of 24 additional clerks, and assuming the availability of countless man-hours of desk officer time, could be completed in about 10 years—while new mountains of classified paper would pile up in the interim."

Statement of William D. Blair, Jr., Deputy Assistant Secretary of State, Hearings at 1564 (daily transcript) (May 2, 1972).

[17] "[O]ur existing system of classification and declassification governed by Executive Order 10501, was not working as it should .... In addition, the automatic declassification provision of E.O. 10501 was virtually inoperative, since the language of the exceptions to it—particularly the definition of Group 3—was so broad

mation Act, on the other hand, addresses the problem of overclassification. It provides for the selective review of classified documents pinpointed by public request. Without such specific reexamination of requested documents, they would remain buried long after any need to keep them secret had elapsed. As William D. Blair, Jr., the Deputy Assistant Secretary of State, put it:

> "In practice, very few classified State Department documents were being assigned to Group 4 for automatic declassification after 12 years; instead, the effective declassification interval was currently 26 years . . . . Ahead of that 26-to-30-year gap, only a thin trickle of classified documents—a very small fraction of the total—was being reviewed and declassified on a page-by-page basis, in response to requests under the Freedom of Information Act, and other special circumstances." Hearings at 1565 (daily transcript) (May 2, 1972).

**3. The petitioners' abandonment of "derivative classification" does not salvage their case.**

Before the courts below, the petitioners claimed the first exemption for all but one of the disputed documents. In so doing, they conceded that several of those documents had not been *independently* classified "secret," but were labelled as such merely because they were attached to, or referred to, *other* documents that had been so classified. The petitioners sought to justify this "bunching of appendages," or "derivative classification," on the authority of a specific provision in

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as to allow almost any classified document to be excluded from automatic declassification, and this privilege was being widely used or abused." Hearings at 1564 (daily transcript) (May 2, 1972).

Executive Order 10501.[18] Section 3(b) of that Order provided:

> "*Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification."

The court of appeals properly rejected this "blanketing" approach.

> "This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order" (Pet. 26).

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[18] The issue of "derivative classification," suggested by the wording of the Irwin affidavit in the district court, surfaced dramatically on appeal when one of the petitioners admitted that at least one of the documents at issue had been labelled "secret" simply because it related to separately classified documents. On August 31, 1971, following the trial court's decision and while the case was before the court of appeals, the petitioner Ruckelshaus was asked by newspaper reporters to comment on the secrecy classification of his report to the petitioner Irwin. Mr. Ruckelshaus replied:

> "The document I received [from Mr. Irwin for comment] was marked 'top secret.' I was informed my comment should be 'top secret.' There was nothing in my comment that needs to be stamped 'top secret'" (App. 58).

Subsequently, the petitioners now advise the Court, the Environmental Protection Agency declassified Mr. Ruckelshaus's letter (Pet. Br. 6, n.5).

The petitioners now recognize that the principle of "derivative classification" embedded in Executive Order 10501 cannot be reconciled with the Act. Indeed, they confess that at least one of the disputed documents was classified "Top Secret" and "Restricted Data," not because of anything *it* contained, but "only because it was to be attached to" *another* document (Pet. Br. 6, n.5). Accordingly, the petitioners "do not rely upon Exemption 1 of the Act as a ground for nondisclosure" of that document (*id.*). And they accept the holding of the court below that a document attached to a classified file, but not independently classified, cannot be withheld merely because it has been incorporated into a secret file (Pet. Br. 8).

Nonetheless, the petitioners continue to press their attack on the correlative holding of the court below that entire documents do not become immune under the Act simply because they have been accorded one over-all classification as a result of a necessity to withhold certain portions. That single over-all classification was also prescribed by Executive Order 10501. Section 3(c) provided:

> "*Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, *notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications*" (emphasis supplied).

The court of appeals similarly rejected blanket reliance on this "internal classification" rule. It said:

> "The same reasoning applies to this provision as to the one dealing with physically-connected doc-

uments. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed" (Pet. 27).

According to the petitioners, this holding — unlike the one relating to "derivative classification" — is infeasible, creates problems for the executive branch, and unduly injects the courts into an area reserved for executive discretion.

The petitioners' effort to amputate the more egregious aspects of Executive Order 10501 cannot succeed. The petitioners confess that the rule of "derivative classification" conflicts with the Congressional policy of disclosure mandated by the Act. But that rule is as much a part of Executive Order 10501 as the rule imposing a single classification on a given document (see Pet. 4). There is no textual basis, in either the statute or the executive order, for the distinction the petitioners now seek to draw. By their efforts to extricate themselves from the indefensible portions of Executive Order 10501, the petitioners effectively concede that that Order cannot be the type of executive order referred to in the statute.

Similarly, there is no basis in policy for the distinction the petitioners attempt to make. A single document may be as easily severable into secret and non-secret components as two documents stapled to one another — as, in fact, is demonstrated by the documents involved in this very case. For the same district judge who refused to look at the nine disputed documents in this case on August 27, 1971, subsequently looked at all but three of them two months later. In *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, — F.2d

— (D.C. Cir. Oct. 28, 1971) (No. 71-1854), the district court ordered the government to submit six of the nine documents here at issue for his personal *in camera* inspection.[19] Upon the government's interlocutory appeal, the court of appeals rejected the contion that an invocation of "executive privilege" precludes an *in camera* screening of the documents by the district court. — F.2d, at —, slip. op., at 3.

The court of appeals provided for a review and stay of its order by this Court, if the government should request it. No applications to that effect were ever made, and the time to seek certiorari has long since expired.[20] The district court performed the *in camera* inspection that the government now says will "create serious problems" (Pet. 10), and released to the public portions of the documents at issue here.[21] The documents were before the court of appeals, and before this Court, on the hearing of the *Nuclear Responsibility* plaintiffs' motion for an injunction.[22] An examination of those documents reveals that the district court — with no apparent difficulty — released not only

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[19] Of the various documents referred to by Mr. Irwin in Paragraph 5 of his affidavit (App. 28-29), the only three not fully reviewed *in camera* in *Nuclear Responsibility* appear to have been Items A, B and B2. See Appendix C in this Brief.

[20] That this decision not to seek review was a deliberate one is established by the statements of the Solicitor General before this Court on the oral argument of *Nuclear Resonsibility*, 404 U.S. 917, *denying injunction* in — F.2d — (D.C. Cir. Nov. 3, 1971) (Nos. 71-1869 & Misc. 3717). See Transcript of Oral Argument in 404 U.S. 917 at 50-51.

[21] See Pet. Br. 5-6, nn.2-4. Not surprisingly, the petitioners "do not seek relief" with respect to the impending *in camera* inspection of documents already inspected and released to the public (*id.*, n. 2).

[22] See Transcript, *supra* n. 20, at 15-16, 26.

materials previously classified as secret solely on the basis of the annexation to other, separately classified documents, but portions of separately classified matter as well.[23]

**B. Executive Order 10501 Has Been Revoked, and Replaced by a New Classification Scheme That Codifies the Decision Below.**

Although the petitioners relegate the matter to a footnote in their brief (Pet. Br. 18, n. 13), the government has promulgated a new executive order to

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[23] The documents disclosed in *Nuclear Responsibility* have been lodged with the Clerk of the Court. One of the documents declassified by excision of certain words and figures is reprinted in part as Appendix D to this brief.

Further evidence that classification under Executive Order 10501 cannot, by itself, satisfy the first exemption is afforded by the involvement of Atomic Energy Act materials. In his affidavit before the district court, the petitioner Irwin relied not only on the "secrecy" classification under Executive Order 10501, but on a "Restricted Data" classification imposed under the Atomic Energy Act, 42 U.S.C. §§ 2014(Y), 2161, 2162 (see App. 28-29). The petitioners are now silent about the latter classification. That silence is not surprising. By no stretch of interpretive ingenuity can the Energy Act be deemed an "executive order" required by the first exemption. Thus, a document classified only under the Energy Act may be withheld under the first exemption only on the basis of an executive order "specifically" requiring its nondisclosure. Yet, the petitioners urge that the same document, classified in the same manner under Executive Order 10501, may be withheld without more. It is incongruous to suggest that Congress would have afforded greater latitude to the withholding of documents classified under a pre-existing executive order than under one of its own statutes. Surely, if Congress had intended, as the petitioners urge, that the first exemption is satisfied by a classification under Executive Order 10501, without more, it would have provided similar treatment for classification under laws such as the Energy Act. The fact that Congress did not do so further shows that Executive Order 10501 cannot have the significance that the petitioners would attribute to it.

regulate the system of secrecy classification. Executive Order 11652 was issued on March 8, 1972, two days after the Court granted review in this case.[24] The new Order expressly revokes Executive Order 10501 and declares the old Order to be superseded as of June 1, 1972. (Resp. Br. App. A, p. 1a).

The new Order explicitly recognizes the Freedom of Information Act. In its preamble, it recites:

> "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current information policies of the executive branch" (Resp. Br. App. A, p. 1a).[25]

In addition to its repeal of the old Executive Order 10501, Executive Order 11652 provides the exclusive authority for the withholding documents under the first exemption of the Act. The Order notes the existence of "some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies" (*id.*). The Order specifies: *"This*

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[24] The text of Executive Order 11652 is reprinted in its entirety as Appendix A to this brief.

[25] In his statement accompanying the promulgation of Executive Order 11652, the President said:

> "The Executive order I have signed today is based upon . . . a reexamination of the rationale underlying the Freedom of Information Act." 8 Presidential Documents 542 (Mar. 13, 1972.

official information or material, referred to as classified information or material *in this order,* is expressly exempted from public disclosure by Section 552(b)(1) of Title 5, United States Code" (*id.*) (emphasis supplied).

Further, Executive Order 11652 requires the government to perform the very portion-by-portion analysis that the court below directed take place *in camera.* The order thus contradicts the petitioners assertion that the portion-by-portion examination called for below is infeasible and "would create serious problems for the executive branch" (Pet. 10). Section 4(a) of the Order provides pertinently:

> "*Documents in General.* . . . Each classified document shall . . . to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."

In his statement accompanying the new Order, the President expressed his dissatisfaction with overclassification under the old order:

> "A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and *innocuous portions of neither paper could be released.*
>
> "To the extent practicable, each classified document under the new system will be marked to show which portions are classified, at what level, and which portions are unclassified." 8 Presidential Documents 544 (Mar. 13, 1972) (emphasis supplied).

Thus, the new classification scheme — which the petitioners have not discussed in their brief, but which will control the case upon the court of appeals' remand to the district court—corroborates the wisdom of the judgment below. The executive branch has itself effectively ratified the very judicial decision that the petitioners here say is unacceptable.

It is undisputed that none of the documents at issue has been appraised in light of Executive Order 11652. That Order requires portion-by-portion classification to facilitate excerpting. No such process has ever taken place here. Nor do the petitioners intimate that they are willing to perform it.

The separation of "secret" from "nonsecret" components ordered by the court of appeals would not pose the problems alluded to by the petitioners. As a practical matter, this distinction can often easily be made by the classifying agency itself. A prime example of such portion-by-portion declassification occurred in *Nuclear Responsibility* when a "secret" AEC evaluation report was submitted to the district court. Prior to submission, the AEC excised the "secret" components, declassified the rest, and ultimately the declassified report was released to the public. Portions of that declassified report are reprinted as Appendix D to this brief.[26] Examination of those sections readily demonstrates how simple it is in fact to declassify certain documents by excision of limited amounts of material. That report apparently was declassified simply by excising all direct and indirect references to the yield of the Amchitka test. Such material constituted a minimal part of the entire report.

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[26] The entire report has been filed with the Clerk.

Petitioners misconstrue the decision below as requiring judicial declassification. No such procedure is necessarily contemplated. Indeed it is quite possible that the district court's sole responsibility will be to ensure that the *executive* goes through each document on a portion-by-portion basis, as was the case in *Nuclear Responsibility,* and as is now required under Executive Order 11652. Thus the role of the courts may simply be to see that the executive does its job in light of the Act's general requirement of disclosure.[27]

## II. THE FIFTH EXEMPTION DOES NOT IMMUNIZE ENTIRE DOCUMENTS SIMPLY BECAUSE THEY ARE CALLED "ADVISORY."

The petitioners also contend that all of the documents at issue are entirely exempt by virtue of the fifth exemption. That exemption immunizes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5).

As the sole support for their claim to the fifth exemption before the district court, the petitioners relied on the statement in Mr. Irwin's affidavit that the agency reports at issue "were prepared solely for the purpose of giving advice to the President . . . and used solely for transmittal to the President as advice and recommendations" (App. 29).[28] In the court of ap-

[27] Precisely this sort of judicial supervision occurred in *Nuclear Responsibility* where the district court examined documents *in camera* with the *ex parte* assistance of technical advisors supplied by the government. Working with those advisors, the district court released portions of the *in camera* materials.

[28] The petitioners supplemented that statement with references to descriptive passages about the Under Secretaries Committee appearing in two reports by the President to the Congress.

peals, they continued to rest upon the assertion that the materials sought by the respondents were "advisory," rather than factual, in nature.

In this Court, the petitioners urge a different theory of the fifth exemption—that the exemption covers not only recommendations or opinions, but also factual information. That distinction between fact and opinion was drawn by the court below and by all the other courts that have considered the question. Further, the petitioners contend, the legislative history establishes that Congress refused to draw such a line—an argument not advanced before the court of appeals.

Apart from the fact that petitioners did not present this theory to the court of appeals, they err in their reading of both the fifth exemption and its history. The language of that exemption directly incorporates the fact-opinion distinction. It does so by limiting the statutory immunity to materials "not available by law to a party . . . in litigation with the agency" resisting disclosure. As the House Report confirms, this language means that the public is entitled to all internal memoranda that a private party could discover in litigation with the agency. H. Rep. No. 1497, *supra,* at 10.

**A. The Exemption Is Limited to the Protection of the Executive Policy-Making Process.**

The fifth exemption, like its companions, is subject to the overriding requirement of § 552(c) that materials not be withheld except as "specifically" authorized by the Act. The provision "encourages the free exchange of ideas among Government policymakers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form

of an internal memorandum." *Wellford* v. *Hardin*, 330 F.Supp. 915, 917 (D. Md. 1971). See also *Soucie* v. *David, supra*, at 1077; Attorney General's Memorandum, *supra*, at 35. The provision protects the agencies from having to "operate in a fishbowl," S. Rep. No. 1497, *supra*, at 10; "but by the same token [seekers of information] . . . should [not] be required to operate in a darkroom." *American Mail Line* v. *Gulick, supra*, at 703.

**B. The Statutory Language, Legislative History, and Judicial Precedent All Establish That the Policy of the Exemption Is Served by the Fact-Opinion Distinction.**

**1. The language of the exemption incorporates the fact-opinion distinction long established in federal discovery.**

Under the fifth exemption, inquiry focuses on whether the documents sought would be "available by law to a party other than an agency in litigation with the agency." § 552(b)(5). The accompanying House report interprets this language to mean that "any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. No. 1497, *supra*, at 10.[29]

[29] The word "routinely" does not appear in the statute. The petitioners rely upon the House Committee's attempted insertion of the word "routinely" to argue that even if the documents sought might otherwise be available in civil litigation, they would not be "routinely" available. The authorities agree that that Report cannot be relied upon as an expression of Congressional will where it conflicts with its Senate counterpart. The one court of appeals, the two district courts and the one commentator who have considered the question all agree that where the Senate and House reports disagree, the Senate report is to be preferred as a reliable indicator of the legislative intent. Since the House report was not published until after the Senate had already passed the bill, only the Senate report was considered by both Houses of

The courts and commentators uniformly agree that the issue posed by the statutory language is whether "'a private party'—not necessarily the applicant—would routinely be entitled to [disclosure of disputed materials] through discovery." Davis, *supra*, § 3A.15, at 158; *Sterling Drug, supra*, at 705; *General Services Administration* v. *Benson*, 415 F.2d at 880; *Tennessean Newspapers, Inc.* v. *Federal Housing Administration*, — F.2d —, slip op. at 5 (6th Cir. May 4, 1972) (No. 71-1676), *aff'g.* 341 F. Supp. 1013, 1014 (M.D. Tenn. 1971); *Consumers Union*, 301 F. Supp., at 805. "Since the . . . Act exempts only records 'not availaible to a party other than an agency,' it does not limit the actions used to test the exemption to ones in which the person seeking the documents is or might be involved. . . . The fulcrum of this test is discovery practices as regulated by the courts. . . ." *Consumers Union, supra.* Under this approach, the agency resisting disclosure in a suit brought under the Act must show that "in the normal sort of action in which the documents might be of value, courts would not order the documents produced. At this point, the burden would shift to the plaintiff at least to come forward with a theory of an action in which a court would order the documents produced." *Benson* v. *General Services Administration*, 289 F.Supp., at 595.

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Congress. *Getman* v. *NLRB, supra*, at 673, n.8; *Soucie* v. *David, supra*, at 1077 n.39; *Benson* v. *General Services Administration, supra*, 289 F.Supp. at 595; *Consumers Union, supra*, 301 F.Supp., at 801; Davis, *supra*, §§ 3A.2, at 116-17 & 3A.31, at 174-76.

In any event, the petitioners overlook that some of the very documents at issue here were disclosed to the plaintiffs in the *Nuclear Responsibility* case—and were disclosed "routinely" in the sense that, pursuant to traditional rules of discovery, the plaintiffs became entitled to see them upon a showing of good cause and particularized need.

Discovery practice in the federal courts has generated many decisions that make available internal memoranda of government agencies by separating fact from opinion. Those pre-Act decisions are now codified by the fifth exemption. They uniformly recognize the "obvious distinction, in terms of necessity of inspection, between documents ['composed wholly of opinions, recommendations and deliberations'] . . . and those which contain facts." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd on opinion below,* 384 F.2d 979 (D.C. Cir.), *cert. denied,* 389 U.S. 952 (1967). *Accord: Machin* v. *Zuckert,* 316 F.2d 336, 340-41 (D.C. Cir.), *cert. denied,* 375 U.S. 896 (1963); *Boeing Airplane Co.* v. *Coggshall,* 280 F.2d 654, 662 (D.C. Cir. 1960). See also *Reliable Transf. Co.* v. *United States,* 53 F.R.D. 24, 25 (E.D.N.Y.) (1971); 4 J. Moore's Federal Practice ¶ 26.61[7], at 26-331 (2d ed. 1971).

Under Rule 26 of the Federal Rules of Civil Procedure,[30] a privilege is generally recognized apart from the Act for "intra- and inter-agency advisory opinions and recommendations submitted for consideration in the performance of decision- and policy-making functions." *Freeman* v. *Seligson,* 405 F.2d 1326, 1339 (D.C. Cir. 1968); *Accord: Wood* v. *Brier,* 54 F.R.D. 7, 12 (E.D. Wis. 1972). See also *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra,* at 324; *Olsen* v. *Camp,* 328 F.Supp. 728, 731 (E.D. Mich. 1970); *Rosee* v. *Bd. of Trade,* 36 F.R.D. 684, 689 (N.D. Ill 1965). But if "there is a need for discovery to preclude prejudice and unfairness, . . . a conditional executive privilege

[30] Rule 26(b)(1) provides pertinently: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

cannot stand in the way of necessary discovery." *Olsen Rug Co.* v. *NLRB,* 291 F.2d 655, 662 (7th Cir. 1961). *Accord: Wood* v. *Brier, supra.* Accordingly, the Government's conditional privilege with regard to advisory opinions does not extend to factual reports and summaries. *McFadden* v. *Avco Corp.,* 278 F.Supp. 57 (M.D. Ala. 1967); *Wood* v. *Brier, supra.*

In sum, "[t]he courts have . . . been dealing with this problem since long before the Freedom of Information Act was passed, and they can bring to the administration of the exemptions of that statute the common sense by which they have had to measure claims of executive privilege." *Ackerly* v. *Ley,* 420 F.2d 1336, 1341 (D.C. Cir. 1969). The Fifth exemption was intended to incorporate that fund of judicial common sense. It preserves and carries forward the careful process of examination—agency-by-agency, case-by-case, and even document-by-document—to ensure consideration of the particular interests at stake.

**2. The legislative history of the Act fully supports the fact-opinion distinction.**

The legislative history shows that Congress intended to differentiate materials that are "part of the deliberate process of the agency" from those that are "factual in substance." *Consumers Union,* 301 F.Supp., at 805. The statutory phrase "which would not be available by law to a party other than an agency in litigation with the agency" was substituted on the recommendation of the Senate Judiciary Committee for an earlier, murkier phrase—"dealing solely with matters of law or policy." S. Rep. No. 813, *supra,* at 1-2. In explaining the old language, the Committee had said in an earlier report that "All *factual* material in Government records is to be made available to the public.

. . ." S. Rep. No. 1219, 88th Cong. 2d Sess. 7 (1964). The substituted language refined the policy-versus-fact distinction so that the distinction would be established in the discovery test now explicitly laid down by the statute. "It is at least clear, in light of the strong Congressional drive to promote disclosure, that the amendment was not intended to place 'factual material' within the coverage of the fifth exemption." *Consumers Union,* 301 F.Supp., at 805.[31]

The House and Senate reports accompanying the bill as finally enacted show that Congress contemplated an exemption carefully tailored to protect agency opinions and recommendations—in the words of the House report, "advice from staff assistants and the exchange of ideas among agency personnel," H.R. Rep. No. 1497, *supra;* and in those of the Senate counterpart, "frank discussion of legal or policy matters in writ-

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[31] In this connection, the petitioners argue (Pet. Br. 32-38) that the language ultimately adopted was selected "in response" to criticism from various government agencies that the phraseology of preceding bills was unduly narrow in failing to exempt factual as well as policy statements. But nothing in the history discussed by the petitioners supports the proposition that the shift in language was prompted by the stimulus they cite rather than by the intention to ensure the availability of factual material. In any event, as Professor Davis has noted,

> "Even though the records of the various hearings over a ten year period are voluminous, probably more than ninety-five per cent of the useful legislative history is found in a ten page Senate Committee report and in a fourteen page House Committee report. . . . Committee reports not addressed to the enacted version of the bill do not show the intent of Congress in enacting the statute. They show what the intent of Congress would have been if it had enacted the bill it did not enact." Davis, *supra,* §§ 3A.2, at 116, 3A.19, at 150 (footnotes omitted), quoted approvingly in *Frankel* v. *SEC,* — F.2d —, slip op. at 2958 (2d Cir. May 4, 1972) (Oakes, J., dissenting).

ing," S. Rep. No. 813, *supra,* at 9 (1965). The disclosure of factual material is entirely consistent with the purposes set forth by the committees; it does not compromise the rendering of advice and the expression of opinion.

**3. The courts agree that facts must be disclosed.**

In construing the fifth exemption, the lower courts have consistently followed the fact-opinion distinction. They have uniformly held that the provision protects "internal communications consisting of advice, recommendations, opinions, and other materials reflecting deliberative or policy-making processes, but not purely factual or investigatory reports." *Soucie* v. *David, supra* (footnote omitted); *Accord: Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.,* 425 F.2d 578, 582 (D.C.Cir. 1970); *Bristol-Myers, Co., supra,* at 939; *General Services Administration* v. *Benson,* 415 F.2d, at 880. See H.Rep. No. 1497, *supra,* at 10; S. Rep. No. 813, *supra,* at 9; *Long Island R.R. Co.* v. *United States,* 318 F.Supp. 490, 499 n.9 (E.D.N.Y. 1970) (three-judge court) (per Friendly, J.); *Consumers Union,* 301 F.Supp. at 805. The exemption embodies "the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended." *International Paper Co.* v. *FPC,* 438 F.2d 1349, 1359 (2d Cir.), *cert. denied,* 404 U.S. 827 (1971); *Ackerly* v. *Ley, supra,* at 1341. The documents are exempt if they "express an exchange of ideas between agencies or their respective staff members," and if the "administrative policy-making process [is] exhibited. . . ." *M. A. Schapiro & Co.* v. *SEC,* 339 F.Supp. 467, 470 (D.D.C. 1972). Policy- and theory-oriented documents

are privileged under the Act; mere factual data are subject to production *Talbott Const. Co.* v. *United States,* 49 F.R.D. 68, 71 (E.D. Ky. 1971).

As the court below has recently said—in a case involving some of the documents here at issue, but in which the government chose not to seek this Court's review—the distinction lies between "those documents or portions of documents that set forth facts [and] . . . those that present comments that must be held confidential in order to maintain the integrity of the executive decision-making process." *Nuclear Responsibility, supra,* slip op. at 6 (emphasis supplied).

**C. The Petitioners Cannot Successfully Contend That Facts Are Inseparable From Opinions.**

The petitioners argue that "the distinction . . . between factual matters and matters related to the 'policymaking process,' is highly unrealistic, for the selection and presentation of factual background bearing on a particular decision is virtually certain to be 'inextricably bound' with the decision-making process" (Pet. 17). That contention overlooks the holding of the court below—that facts are exempt from disclosure wherever they are "inextricably intertwined" with the policymaking process.

The petitioners' contention also ignores the realities of this case—that the district judge who has already examined the documents made just the distinction between fact and opinion that the petitioners say cannot be done. In the *Nuclear Responsibility* case, the trial court examined a large number of materials and then released to the public portions of at least three documents—documents that the petitioners continue to claim are entirely "advisory" (Pet. Br. 5-6 nn. 2-4).

A particularly dramatic illustration occurred in the case of the memorandum of the Council on Environmental Quality. In an affidavit filed in the *Nuclear Responsibility* case, petitioner Train asserted, with respect both to that memorandum and other papers:

> "I have determined that it would be injurious to the proper performance of the Council's statutory responsibilities as an advisor to the President to disclose the documents or their contents. . . ."

Nonetheless, the district court directed the release of all but two portions of the memorandum following an *in camera* inspection of the document. The released portions of that memorandum have been reprinted as an appendix to the respondents' brief in opposition to the petition for a writ of certiorari. Those portions speak for themselves. They reveal the solely factual nature of the material disclosed.

### III. THE COURT OF APPEALS PROPERLY DIRECTED AN IN CAMERA INSPECTION OF THE DISPUTED DOCUMENTS

The petitioners assert that the materials in dispute are entirely exempt under the Act, both because they have been classified "pursuant to Executive Order 10501" (Pet. 11) and because they are "entirely advisory in nature" (*id.* 18, n. 11). For the reasons set forth above, that assertion is untenable because it rests on an erroneous interpretation of each of the two exemptions at issue. Moreover, the petitioners' characterizations of the documents have never been tested in a judicial proceeding. Rather, the petitioners have offered only the unilateral assertion that they are entitled to withhold the disputed documents under one or both of the exemptions.

The petitioners cannot thereby have satisfied the requirements of the Freedom of Information Act. The express statutory language, it will be recalled, stipulates that upon the filing of a complaint, the federal district court "shall determine the matter de novo and the burden is on the agency to sustain its action." § 552(a)(3). In accordance with the statutory mandate, the court of appeals in this case could have found that the evidence the petitioners had adduced in support of their claimed right to withhold the documents failed to carry their burden, and that the documents should be released in their entirety.

Instead, as a protection to the Government, and to guard against the possibility of undue disclosure, the Court declined to act on the merits of the litigation on the basis of the evidence proffered by the petitioners. The court remanded the matter to the trial court to give the petitioners a second chance to prove their case. And, as a *further* protection to the Government, the court directed an *in camera* inspection of the disputed materials.

To be sure, the process of *in camera* inspection, as ordered by the court of appeals, departs from the normal course of civil litigation. As this Court had occasion to say in the criminal context in *Alderman* v. *United States,* 394 U.S. 165, 183-84 (1969):

> "Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adver-

sary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

"Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands."[32]

The *in camera* practice is acceptable only in limited circumstances, where the traditional adversary process poses clearly defined and unacceptable hazards.[33] It necessarily "short-circuits the adversary process"; one party must operate in the dark, lacking knowledge of the contents of the documents held by the other side necessary to question whatever *ex parte* assertions its adversary may have made. *Sterling Drug, supra,* at 715 (concurring and dissenting opinion).

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[32] As recently as last Term, and despite the urgings of the Government, this Court pointedly declined to re-examine "the basis and scope" of *Alderman's* confirmation of the preference for adversary proceedings in our system of justice. *United States* v. *United States District Court,* — U.S. —, n. 21, 41 U.S.L.W. 4761, 4769 n. 21 (1972).

[33] See *Wood* v. *Brier, supra,* at 9, n. 5 (undertaking *in camera* inspection only where neither party objected).

**A. Within Properly Drawn Limits, in Camera Inspection Is an Appropriate Procedure—Generally, Under the Act, and on the Facts of This Case.**

**1. The courts have already looked at documents involved in this case and have directed public disclosure of substantial portions.**

The petitioners would foreclose not only the traditional adversary system, but even an *ex parte* judicial determination whether they are entitled to the claimed exemptions. No court has ever independently concluded, on the basis of its own examination of the documents, that those documents in fact have been classified "pursuant to" Executive Order 10501, or are "entirely advisory." To the contrary, to the extent that the courts have looked at the documents—and the judges of three courts, including this one, have presumably done so in the *Nuclear Responsibility* litigation—they have made the opposite determination. District Judge Hart, in an action left undisturbed both by the court below and by this Court, directed the release of significant portions of the documents. Presumably he would not have done so if he had believed that those portions disclosed either properly classified secrets or agency opinions entitled to be held in confidence.

**2. In camera inspection is accepted in litigation generally.**

The government has not objected to *in camera* inspections of "secret" materials by trial and appellate courts and by this Court—in cases where *it* has applied for judicial review. See, *e.g., New York Times Co.* v. *United States,* 403 U.S. 713, *aff'g United States* v. *Washington Post Co.,* 446 F. 2d 1327, 1328 (D.C. Cir.) and *rev'g United States* v. *New York Times Co.,* 444 F. 2d 544 (2d Cir.), *rev'g* 328 F. Supp. 324, 326 (S.D. N.Y. (1971)). To the contrary, the Solicitor General

urged this Court not long ago to resolve conflicts between the litigant's right to information and the government's need for secrecy by subjecting disputed materials to *in camera* inspection:

> "It is . . . familiar doctrine that when there is some recognized interest militating against unnecessary public disclosure of information which a litigant is seeking to discovery, it is appropriate to submit the material to the district judge for *in camera* examination so that he may determine whether disclosure should be ordered." [34]

The government again advanced this argument at the last Term of Court. In its brief in *United States* v. *United States District Court*, — U.S. —, 41 U.S.L.W. 4761 (1972), the government said:

> "When interceptions are made for national security purposes, the reasons are especially strong for permitting courts to determine *in camera* whether the information obtained thereby is arguably relevant to a prosecution before turning the material over to a defendant; and courts should be permitted to make an initial determination *in camera* with respect to these interceptions." Brief for the United States, at 36.

This Court has frequently provided for *in camera* inspection of documents over which the government and private litigants have conflicting claims. See *Taglianetti* v. *United States*, 394 U.S. 316 (1969) (electronic surveillance); *Dennis* v. *United States*, 384 U.S. 855, 874-75 (1966) (disclosure of grand jury minutes subject to *in camera* deletion of "extraneous

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[34] *Kolod* v. *United States*, 390 U.S. 136, Memorandum of the United States on Motion to Amend Order of Jan. 28, 1968, at 8, modified *sub nom. Alderman* v. *United States*, *supra*.

material"); *Campbell* v. *United States,* 365 U.S. 85, 95 (1961) (Jencks Act statements); *Palermo* v. *United States,* 360 U.S. 343, 354 (1959) (same); *Roviaro* v. *United States,* 353 U.S. 53 (1957) (disclosure of informant's identity); see also *United States* v. *Reynolds,* 345 U.S. 1, 10 (1953).

**3. The in camera proceeding is one of the tools available to the judiciary under the Act.**

The court below has not insisted upon an *in camera* inspection in every Freedom of Information Act case. "[T]he court need not inspect the [disputed document]," the court of appeals has said, "if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified." *Soucie* v. *David, supra,* at 1080 (footnote omitted). Because the Act requires a *de novo* determination of the government's decision to withhold requested documents, and places the burden of persuasion on the government, a judicial determination does require the agency opposing discovery to submit detailed evidence supporting its asserted right to withhold the documents. "Although proof may be made by affidavits, a bare statement that the documents are within the exemption is insufficient." *Sterling Drug, supra,* at 714-15, (concurring and dissenting opinion). Testimony before the trial court by the individuals who prepared the documents may be required before the court can decide the applicability of the statutory exemptions. In certain cases, it may be necessary to produce the documents themselves for examination by the parties under an appropriate protective order prohibiting disclosure to the general public or other unauthorized use. In any event, the trial court must take all possible procedural steps to obtain the maximum

amount of evidence concerning the true nature of the requested materials.

In this case the trial court took none of the above steps. It was prevailed upon by the petitioners to grant summary judgment on the basis of a conclusory, inadequate affidavit—an affidavit that on its face advanced some claims to "secrecy" that the petitioners now abandon. The proceeding in the trial court surely was not the *de novo* hearing, with the burden of proof on the government, that is mandated by the statute.

In these circumstances, the court of appeals responsibly directed an *in camera* inspection by the trial court. It did so as a protection to the government, even though the government's proof *dehors* the documents had failed to meet its statutory burden. The court of appeals acted in light of its past decisions under the Act, employing the *in camera* device to refine the scope of permissible discovery where the government and trial court below had failed adequately to perform that process.

The practice of *in camera* inspection under the Freedom of Information Act is not confined to the District of Columbia Circuit where the courts have special expertise in the administration of the Act.[35]

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[35] The courts in the circuit below have frequently had recourse to *in camera* inspections in lawsuits brought under the statute. See *Soucie* v. *David, supra,* at 1079-80; *Sterling Drug, Inc.* v. *FTC,* at 703, 704; *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd, supra,* at 580-81, 582; *Bristol-Myers Co.* v. *FTC, supra,* at 939; *Ackerly* v. *Ley, supra,* at 1341; *M. A. Schapiro & Co.* v. *SEC,* 339 F.Supp., at 469; *Wecksler* v. *Shultz,* 324 F.Supp. 1084, 1087 (D.D.C. 1971); *Wellford* v. *Hardin,* 315 F.Supp. 768, 770 (D.D.C. 1970). *Accord: Boeing Airplane Co.* v. *Coggeshall,* 280 F.2d 654, 662 (D.C. Cir. 1960 (pre-Act case).

It is also followed in the Second,[36] Fourth,[37] Fifth,[38] and Ninth[39] Circuits.

**B. The Petitioners' Claims of "Secrecy" and "Advice" Do Not Require a Different Approach.**

**1. The need for independent judicial review does not vanish simply because disputed materials allegedly involve military or diplomatic secrets.**

When confronted in the past with claims of privilege founded on military secrets, the Court has not suggested judicial abandonment of the field. It has instead developed a "formula of compromise" taking into account all interests concerned. *United States* v. *Reynolds*, 345 U.S. 1, 9 (1953). "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.*, at 9-10.

The petitioners ask this Court to surrender the judicial function directed by *Reynolds*. They suggest that the entire field of secrecy classification is so committed to executive discretion that the federal courts can play no role whatever (Pet. 23-24).

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[36] *Frankel* v. *SEC*, 336 F.Supp. 675, 678 (S.D.N.Y. 1971), *rev'd on other grounds*, — F.2d —, (2d Cir. May 4, 1972) (No. 71-2213).

[37] *Wellford* v. *Hardin*, 315 F.Supp. 175, 179 (D.Md. 1970) *aff'd*, 444 F.2d 21 (4th Cir. 1971). See also 330 F.Supp. 915, 918 (D.Md. 1971).

[38] *Evans* v. *Dep't of Transportation*, 446 F.2d 821, 823 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (exemptions three and seven).

[39] *General Services Administration* v. *Benson*, *supra* (to determine validity of GSA's claim to fifth exemption); *Cowles Communications, Inc.* v. *Dept. of Justice*, 325 F.Supp. 726, 727 (N.D. Calif. 1971) (to determine whether certain files contain investigatory materials compiled for law-enforcement purposes under the seventh exemption).

Last Term, the Court considered—and rejected—an analogous argument by the government that the federal judiciary should be excluded from the review of electronic surveillance conducted in the name of "domestic security." The Court there said:

> "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. *Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ordinary crime.* If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.
>
> "Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. *The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases.* Title III of the Omnibus Crime Control and Safe Streets Act already has imposed this responsibility on the judiciary in connection with such crimes as espionage, sabotage and treason, [18 U.S.C.] § 2516 (1)(a)(c), each of which may involve domestic as well as foreign security threats. *Moreover, a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge.* Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Govern-

ment itself to provide the necessary clerical assistance." *United States* v. *United States District Court, supra,* 40 U.S.L.W., at 4768 (emphasis supplied).[40]

**2. A general assertion that disputed materials are all "advisory" does not conclude analysis under the fifth exemption.**

As the court below has cautioned, "courts must beware of 'the inevitable temptation of a government litigant to give [the fifth exemption] an expansive interpretation in relation to the particular records at issue.'" *Soucie* v. *David, supra,* at 1078; *Ackerly* v.

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[40] In support of their claim that the first exemption automatically and without judicial review upon an involation of Executive Order 10501, the petitioners rely upon the decision of the Court of Appeals for the Ninth Circuit in *Epstein* v. *Resor,* 421 F.2d 930, *cert. denied,* 398 U.S. 965 (1970). But far from supporting the petitioners, *Epstein* confirms the interpretation of the Act advanced by the court below.

*Epstein* stands for the very proposition that the federal judiciary may determine in a Freedom of Information Act suit whether various portions of classified documents should be released (Pet. 15). The district court in *Epstein* said:

> "[I]t is equally without merit to say that Congress intended absolutely no effect by the Act on information that falls within the areas covered by the exemptions. The district courts at least have jurisdiction to determine whether the exemption applies in a given situation. In furtherance of this jurisdiction, it is reasonable to say that Congress intended the courts to determine whether classification within the first exemption is clearly arbitrary and unsupportable. Otherwise, the agencies could easily frustrate the purpose of full disclosure intended by Congress merely by labeling the information to fall within the exemption." 296 F.Supp., at 217.

The court of appeals expressly affirmed this holding, agreeing with the district court's ruling that "under (b)(1) it had authority to determine whether classification was arbitrary or capricious." 421 F.2d, at 933.

*Ley, supra,* at 1341. The burden is on the Government to prove that "releasing the factual information . . . will expose the decisional processes of the President or other executive officers with policy-making functions." *Soucie* v. *David, supra.*

An illustration of the importance of preserving judicial review of agency claims that documents are entirely "advisory" is afforded by *Soucie* v. *David, supra.* There the Office of Science and Technology ("OST")—a petitioner here—sought to withhold the Garwin Report, a study of the supersonic transport plane (the "SST") prepared by an *ad hoc* committee that it had convened. The government resisted disclosure of the Report on the ground that it "was prepared for the sole purpose of conveying views, evaluations, opinions and recommendations to the President, at the President's request. It was prepared as an aid to the President in the course of his deliberations, and for no other purpose" (DuBridge Aff., ¶ 3, filed in C.A. No. 1571-71 (D.D.C.)).

In remanding to the district court, the court of appeals set forth the distinction between factual information and advice adverted to above, and envisaged an *in camera* inspection in aid of that distinction. Subsequent to the remand—and well after Congressional defeat of the SST proposal—the OST released the very report it had struggled for over a year to withhold. Examination of the report reveals the error in the OST's initial refusal to disclose it to the public.[41] Although the report contains recommendations and advice, consideration of the document as a whole estab-

[41] A copy of the SST report has been lodged with the Clerk of the Court.

lishes that its factual materials could be segregated for public release, and even that its release in its entirety could not impair "the decisional processes of the President." Moreover, the OST's release of the report without injury to the decisional process—albeit after the SST question became academic—demonstrates that the mere claim that the agency exists to give advice, or that its work-product is solely advisory, should not suffice to confer immunity under the exemption.

With respect to both the first and fifth exemptions, "The Government should not be allowed to file an affidavit stating [the] conclusion [that a document is exempt under the Act] and by so doing foreclose any other determination of the fact." *Cowles Communications* v. *Department of Justice,* 325 F. Supp. 726, 727 (N.D. Cal. 1971). *Accord: Frankel* v. *SEC,* 336 F. Supp. 675, 677 n. 4 (S.D.N.Y. 1971), *rev'd on other grounds,* —— F. 2d —— (2d Cir. May 4, 1972) (No. 71-2213). In sum, the federal judiciary cannot accept an unreviewable claim of privilege—certainly not where Congress has mandated by statute that the government carry the burden of persuasion on the question whether it is entitled to withhold information from the public. The petitioners' assertion that the documents here at issue all fall within one or both of the two exemptions amounts to a thinly disguised rejection of *any* role for the federal judiciary in the administration of the Freedom of Information Act, and a destruction of the Act itself. Their position effectively is that the statutory requirement of *de novo* judicial review, with the burden of proof of the agency should be drained of meaning and that independent judicial inquiry may be foreclosed by the *ex parte* assertion that records are immune to disclosure. That position must be rejected if the Act is to survive.

## IV. RESPONDENTS ARE ENTITLED TO SEEK DISCLOSURE AS MEMBERS OF CONGRESS AND AS SUCH THEY ARE NOT SUBJECT TO THE EXEMPTIONS IN THE ACT.

Respondents brought this litigation in their individual capacities both as Members of Congress and as private citizens. They urged that, as Members of Congress, they were not subject to the exemptions in the Act. (App. 14; R. 5, 9). The District Court dismissed the suit "insofar as [respondents] seek to maintain the action in their capacity as Members of Congress on the ground that [they] have failed to present a justiciable case or controversy, and they may not maintain the action in that capacity by reason of the Separation of Powers provisions of the Constitution." (Pet. App. 32). The District Court was clearly wrong in that conclusion and that error precludes reinstatement of the District Court judgment as now urged by the government in this Court.[42]

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[42] The issues discussed in this section of respondents' brief were raised in, but not decided by, the court of appeals. However, respondents are entitled to rely on these issues in support of the court of appeals' judgment vacating the judgment of the District Court and remanding the case for further proceedings.

As the Court stated in *Dandridge* v. *Williams*, 397 U.S. 471 (1970):

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. Compare *Langnes* v. *Green*, 282 U.S. 531, 538, with *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555-567-568. As the Court said in *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425, 435-436: '[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question,

**A. As Members of Congress, Respondents Are Not Subject to the Act's Exemptions From Disclosure.**

As private citizens, respondents are clearly "persons" within the meaning of the Act and entitled to all the rights of persons seeking information under the Act. In addition, however, respondents are duly sworn and elected Members of Congress. As such, they have an independent statutory right to information under the Act. Although the Act authorizes the withholding of certain information from the "public," it specifically states that it "is not authority to withhold information from Congress." § 552(c).[43]

The statutory language cited above must be read in context. The Act expresses a general rule of disclosure and authorizes limited exemptions from disclosure in § 552(b). In subsection (c), it specifies that those exemptions authorize the withholding of information from "the public." But, continuing, it emphasizes that the contents of the section are "not authority to withhold information from Congress." Thus, the exemptions spelled out in § 552(b) are inapplicable to respondents as Members of Congress. In the absence of any exemption, the general rule of disclosure applies.

The Court of Appeals for the District of Columbia Circuit has previously seemed to confirm respondents' reading of the Act. It has noted that while the right of a Congressman as a private person "to obtain [in-

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the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed.'" *Dandridge, supra,* at 475, n. 6.

[43] "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress." 5 U.S.C. § 552(c).

formation] . . . under the Act is equal to that of [a private citizen] . . ., *his right as a Congressman is presumably greater.*" *Soucie* v. *David, supra,* at 1071, n. 6 (emphasis added). See also *id.* at 1081 (Wilkey, J., concurring).

It is readily apparent why Congress would distinguish between information available to the public and information available only to members of Congress. Congressmen have special needs for access to governmental information. Their constitutional obligation necessarily requires regular access to documents and information which would not routinely be available to the public. As Mr. Justice Stewart stated recently, "In preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch or from citizens in private life." *Gravel* v. *United States,* — U.S. — (Nos. 71-1017, 71-1016, June 29, 1972), 40 U.S.L.W. 5053, 5060. Section 552(c) recognizes this distinction and incorporates it in express language.

The real question of congressional and executive power presented by this case is whether the Freedom of Information Act will impede further erosion of Congress' constitutional role as a co-equal branch of the United States government. The practical inability of Congress as an institution to obtain needed information is well known. Any assumption that the congressional hearing process is totally sufficient to obtain necessary information is false. The recent efforts of the Senate Foreign Relations Committee to obtain information concerning the war in Indochina and foreign aid plans from the Defense Department and the De-

partment of State are but isolated instances of a much larger institutional problem.

The inability of Congress itself to obtain information from the Executive is magnified several times over when an individual Congressman seeks such information. It is possible that committee chairmen, senior members of Congress, or close friends of executive officers can obtain needed information. But the freshman Congressman or member of the opposition party faces a high hurdle in his inquiries. Although a Congressional committee might be able to obtain information from the Executive, frequently an individual Congressman—hemmed in by the seniority system and other hierarchical barriers—cannot get the committee to act. And if individual Congressmen are uninformed, the power of government rests not in the people and their representatives but in the hands of a few powerful and well-informed individuals. Appellants contend that the Freedom of Information Act represents a Congressional attempt to remedy this situation by vesting special rights of access to information in Members of Congress. In evaluating this contention, it is well to remember the words of Mr. Justice Jackson: "I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of the Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 654 (1952) (concurring opinion).

**B. Respondents' Capacity To Sue as Members of Congress Does Not Present a Non-Justiciable Issue.**

By dismissing the action on grounds of justiciability, the district court in effect declined to exercise its power to decide a case which fell within its subject matter jurisdiction. See *Baker* v. *Carr,* 369 U.S. 186, 198 (1962). The refusal to hear the case on grounds of nonjusticiability was, however, clearly erroneous.

This Court recently noted that two determinations must be made as to justiciability:

> "First, we must decide whether the claim presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution." *Powell* v. *McCormack,* 395 U.S. at 516-17.

The question under the first test is a narrow one, namely "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker* v. *Carr,* 369 U.S. at 198. The case at hand does not present a problem of justiciability under that test. The duty at issue and its breach—the duty to disclose and the failure to do so—can be judicially determined; and a judicial remedy may be readily fashioned. Such a task is involved in every suit under the Freedom of Information Act and is not changed because Congressmen are the plaintiffs. The second test of justiciability, namely a decision not to exercise jurisdiction because of the separation of

powers within the Federal Government might be considered more relevant.

Again, however, it is not within the discretionary power of a federal court to dismiss every suit that raises an issue of separation of powers. Instead, there are few instances in which separation-of-powers cases may be dismissed as nonjusticiable. They consist, exclusively, of ones in which

> "is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on the question." *Baker* v. *Carr,* 369 U.S. at 217.

The case at hand does not fall within any of the above categories. It raises no issues that the Constitution has committed to another branch of the government. It involves no determination of standards or policy that the judiciary is incapable of making. And it does not concern a matter in which the courts would lack the final word. Instead, it is simply a case in which individuals seek relief under an Act of Congress vesting them with a cause of action. And to the extent that it calls upon the courts to fashion standards, to apply them, and to enforce their decision, it differs in no way from other Freedom of Information Act suits.

The fact that respondents seek a determination of their rights "as Congressmen" does not make the issue nonjusticiable. *See, e.g. Powell* v. *McCormack,* 395 U.S. 486 (1969); *Gravel* v. *United States,* — U.S. — (Nos. 71-1017, 1026) (June 29, 1972); *United States* v. *Brewster,* — U.S. — (No. 70-45) (June 29, 1972). Nor is it relevant that the Congressmen are suing other government officials and agencies. Federal officers have frequently sued federal agencies. *See, e.g., United States ex rel. Chapman* v. *FPC,* 345 U.S. 153 (1953); *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954); *Udall* v. *FPC,* 387 U.S. 428 (1967); *Summerfield* v. *CAB,* 207 F.2d 200 (D.C. Cir. 1953), aff'd sub nom. *Western Air Lines, Inc.* v. *CAB,* 347 U.S. 67 (1954).

The district court in effect reached out to decide a constitutional issue of "separation of powers" that was not presented in the case. Troubled by the fact that respondents sued in their capacities as Congressmen, the district court interpreted the suit as presenting a constitutional challenge by Congress to the President's decision to withhold information. The district court unjustifiably assumed it was being asked to arbitrate a constitutional conflict between coordinate branches of the federal government. This case does not raise such an issue. Instead, what the district court—and now this Court—was being asked to do was simply to decide whether the Freedom of Information Act provides respondents with special claims for relief in their capacities as Congressmen.

## CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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